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MARIA YUSOF v. ABDULLAH GENDAK

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[ORIGINATING SUMMONS NO: 24NCVC-67-02-2015]
15 JULY 2015

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CIVIL PROCEDURE: *Affidavits – Failure to file – Land law – Application for removal of caveat – New affidavits to support affidavit in reply not filed in court registry – Filing and stamping fees not paid – Whether affidavits can be used and relied on – Whether valid – Whether impaired integrity of contents – Whether caused undue hardship or substantial prejudice to other party – Rules of Court 2012, O. 1A, O. 41 r. 11, O. 44 r. 11*

C

CIVIL PROCEDURE: *Affidavits – Jurat – Land law – Application for removal of caveat – Deponents deemed illiterate because affidavits not signed but were affixed with thumbprints – Affidavits did not contain requisite jurat to be used in cases involving illiterate deponents – Whether affidavits defective – Rules of Court 2012, O. 41 rr. 3, 8*

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LAND LAW: *Caveats – Removal – Application for – Defendant cultivated palm oil field on part of plaintiff's land – Defendant entered private caveat – Application by plaintiff for removal of caveat – Whether defendant had caveatable interest over land – Whether entry of private caveat justified – National Land Code, s. 327*

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The present application involved a dispute on land ('the said land') ownership among relatives. The plaintiff was the registered owner of 1/8 of the said land. The defendant had been cultivating a palm oil field on a part measuring about 2 1/4 acres within the said 1/8 share and had entered private caveat on the said land. Dispute arose when the plaintiff asserted her ownership of the 1/8 of the said land, including the disputed part. According to the plaintiff, the defendant and his family were merely given the consent to enter into and cultivate the disputed part and nothing more. The defendant claimed that the disputed part had always been understood to be held for the benefit and on behalf of his mother. The defendant supported his argument with two affidavits ('the two affidavits'), exhibited in exh. AG4. The plaintiff denied the existence of such understanding on ownership and in turn, supported her contention with three affidavits ('the three affidavits'). The plaintiff proceeded to apply for the removal of the private caveat entered by the defendant, pursuant to s. 327 of the National Land Code. The parties raised preliminary objections. The plaintiff objected to the two affidavits filed by the defendant on the grounds that they had not been filed in the court registry and the requisite filing and stamp fees had not been paid. Further, these were new affidavits affirmed and intended to support the defendant's case and had not been used in other proceedings. On the other hand, the defendant objected to the plaintiff's reliance on the three affidavits on the ground that the three deponents of the affidavits were considered illiterate

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because, instead of signing their respective affidavits, the three had their thumbprints affixed. The defendant further submitted that the plaintiff had violated O. 41 r. 3 and r. 8 of the Rules of Court 2012 ('ROC') as the three affidavits did not contain the requisite jurat to be used in cases involving deponents who are illiterate.

Held (dismissing appeal):

(1) The two affidavits adduced by the defendant may accordingly be used and relied on by the defendant in the instant proceeding. The two affidavits had been properly exhibited to the affidavit in reply affirmed by the defendant in accordance with O. 41 r. 11 of the ROC which governs documents annexed to affidavit. The two affidavits were properly annexed to the affidavit in reply of the defendant and correctly identified by a certificate by the Commissioner for Oaths before whom the said affidavit by the defendant was sworn. Exhibits annexed to an affidavit form part of the affidavit. (paras 21 & 22)

(2) Even if the two affidavits by the defendants could not be deemed valid despite being in adherence to O. 44 r. 11 of the ROC, O. 41 r. 4 may justifiably be invoked and leave be granted to allow the use of the same notwithstanding the irregularity, which is formal in nature and did not, in any way, impair the integrity of their contents and certainly did not occasion any undue hardship or substantial prejudice to the plaintiff. Furthermore, O. 1A of the ROC mandates a judge to have regard to the overriding interest of justice and not only to the technical non-compliance with the rules and this is relevant to the two affidavits in exh. AG-4. (para 21)

(3) The non-compliances with O. 41 r. 3 of the ROC, in respect of the failure to state the certification jurat by the Commissioner for Oaths would constitute a substantive irregularity which does not only affect the form of the requirements of O. 41 r. 3 but could also be deemed to be a breach of a fundamental nature that could not be cured or remedied by O. 41 r. 4 nor O. 1A nor O. 2 r. 3 of the ROC. The terms of O. 41 r. 3 of the ROC are mandatory and precluded the application of O. 2 r. 3. The defect was serious and went to the root of the affidavit. It was fundamental and had occasioned a substantial miscarriage of justice and a prejudice that could not be cured by either amendment or an order for costs because it could not be said that the deponents actually understood what was written in the affidavits. Even if there was no prejudice, a defect in an affidavit could be so serious to make it incurable under O. 2 r. 1 of the ROC. (para 38)

(4) There was no other evidence to persuade the court to admit the affidavits such as a confirmation by lawyers by affidavit that the three had been given explanation about the affidavits and the thumbprints were certified to be theirs. The omission in respect of the certification in the jurat is substantive and sufficiently material because rules concerning

certification jurat could not be considered as mere technicalities or formalities. They were integral to the very question on the authenticity of the contents of the affidavits which were used as evidence. The plaintiff could not place any reliance on the three affidavits as they were defective. (para 38)

(5) The defendant had shown that he had a caveatable interest over the said land, justifying the entry of the private caveat. The case of the plaintiff is considerably weakened since a number of positive assertions and averments by the defendant on the principal issues of the requests and understanding concerning the disputed part could not be contradicted by the plaintiff. (paras 45 & 47)

Case(s) referred to:

Calex-HLK Ltd lwn. Nordin Abdul Hamid & Satu Lagi [1997] 5 CLJ 58 HC ***(refd)***
Cendana Konsep Sdn Bhd v. Island Concept Sdn Bhd [2013] 1 LNS 858 HC ***(refd)***
Chan Kiew v. Lai Sang & Anor [2002] 5 CLJ 69 HC ***(refd)***
Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim (No 2) [1999] 4 CLJ 21 HC ***(refd)***
Doyle v. Olby (Ironmongers) Ltd [1969] 2 All ER 199 ***(refd)***
Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168 SC ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(dist)***
Fulcrum Capital Sdn Bhd v. Low Kon Yang [2003] 8 CLJ 149 HC ***(dist)***
Fung Yuk Lien v. Foong Chee Sam [2000] 6 CLJ 411 HC ***(refd)***
Gan Thing Phing v. Ong Gek Kim (No 2) [1999] 7 CLJ 146 HC ***(refd)***
Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors (No 2) [2003] 3 CLJ 39 HC ***(refd)***
Ian James Rogers v. Menteri Sumber Manusia & Satu Lagi [1997] 1 LNS 433 HC ***(refd)***
Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn Bhd (No 1) [2001] 8 CLJ 300 HC ***(refd)***
Jit Kaur v. Parl Singh [1974] 1 LNS 57 HC ***(refd)***
Jivanjit Kaur Sohan Singh v. Amar Singh Sunder Singh [2000] 1 LNS 64 HC ***(refd)***
Lee Chin Ho & Anor v. Syed Hussien bin Salim Al-Attas & Anor [2000] AMEJ 0106 ***(refd)***
Long Pines Enterprise Sdn Bhd v. Beeran Kutty Yusof [1999] 1 CLJ 278 HC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
M Ratnavale v. S Lourdenadin [1988] 2 MLJ 370 ***(refd)***
Mohan Paramsivam v. Sepang Omnibus Company Sdn Bhd [1988] 1 LNS 207 HC ***(dist)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Onn Yee Kien & Anor v. On Giin Chuang [2013] 5 CLJ 837 CA ***(dist)***
Pilkington v. Himsworth [1835] 5 LJ Ex Eg 47 ***(refd)***
Re Hinchcliffe (1895) 1 Ch 177 ***(refd)***
Rock Records (M) Sdn Bhd v. Audio One Entertainment Sdn Bhd [2005] 1 CLJ 200 HC ***(refd)***
S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1995] 2 CLJ 152 HC ***(refd)***
UMAS Sendirian Bhd v. RHB Bank Bhd & Anor [2000] 6 CLJ 564 HC ***(refd)***
Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh [2001] 2 CLJ 235 HC ***(refd)***
Wong Choon For v. Lim Chee Hooi & Ors [2002] 5 CLJ 556 HC ***(dist)***
Wong Hong Toy & Anor v. PP [1986] 2 CLJ 491; [1986] CLJ (Rep) 851 HC ***(refd)***

Legislation referred to:
National Land Code, ss. 323(1), 327(1), 340(1)
Rules of Court 2012, O. 1A, O. 2 r. 3, O. 32 r. 13(1)(b), O. 39, O. 41 rr. 3, 4, 8, 9(1), (2), 10(2), 11, O. 44 r. 11(1), O. 49 rr. 10(1), (2)
Rules of the High Court 1980, O. 2 r. 1, O. 41 rr. 1(7), (8), O. 92 r. 1

Other source(s) referred to:
The Torrens System in Malaya, pp 347-348

For the plaintiff - Zulkiflee Othman; M/s Zulkiflee Othman & Co
For the defendant - Nor Aishah Abdul Rahman; M/s Faizah, Aishah Rahman & Assocs

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali JC:

Application

[1] This was an application by the plaintiff under s. 327 of the National Land Code ("NLC") for the removal of a private caveat entered in respect of the land held under Geran No. 82356, Lot 570 Mukim Serkat, Daerah Pontian, Johor ("said land") (encl. 1).

[2] I heard the matter and submission of parties on 20 May 2015, and on 16 June 2015 allowed the preliminary objection raised by the defendant, and dismissed the application. This is my judgment containing the full grounds of my decision, focusing in part on the law concerning jurat certificate in affidavits of deponents who are illiterate.

Key Background Facts

[3] The application involves a dispute on land ownership amongst relatives, all of whom are direct descendants of one Hj Kunok bin Abdullah who has long passed away. The plaintiff, Maria bte Yusof is a grand daughter of Ehdawiyah bte Hj Kunok. The defendant is a son of the late Halipah bte Hj Kunok.

[4] The plaintiff is presently the registered owner of 1/8th of the said land. The entirety of the 1/8th of said land measured about 8.25 acres. The 1/8th share of the said land was recorded to have been transferred to the plaintiff by Ehdawiyah bte Hj Kunok, the grandmother of the plaintiff. The latter had prior to the transfer been the registered proprietor of the 1/8th share since 1957.

[5] At all material times for the last 30 years or so, the defendant and his family had been cultivating a palm oil field on a part measuring about 2 1/4 acres ("the disputed part") within the said 1/8th share of the said land, on account of their own efforts and funds. The defendant would also pay the quit rent due on the disputed part to the representative of the owners holding 3/4th of the said land.

A **The Dispute**

[6] The plaintiff asserted her ownership of the 1/8th share of the said land registered since 4 November 2014, inclusive of the disputed part and contended that the defendant and his family had merely been given the consent to enter into and cultivate the disputed part, and nothing more.

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[7] The defendant, whose private caveat was registered on the said land on 5 November 2014, less than 24 hours after the registration of the transfer of ownership in favour of the plaintiff, claimed that part of the said land (specifically, the disputed part) had always been understood to be held for the benefit and on behalf of the defendant's mother, Halipah bte Hj Kunok.

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[8] The defendant averred that the late Hj Kunok bin Abdullah had long ago, and as commonly done by the elderly during the time, expressed the wish to one of his daughters, Ehdawiyah bte Hj Kunok that a part of the said land earlier transferred to her (ie, the disputed part out of the 1/8th share) should be held for the benefit of her sister, Halipah bte Hj Kunok, who was the defendant's mother. This reminder by Hj Kunok bin Abdullah to Ehdawiyah bte Hj Kunok was said to have been witnessed by Halipah bte Hj Kunok herself, as well as two of the defendant's aunts, Aminah bte Hj Kunok and Weloh binti Lokonok and an uncle, Md Salleh bin Saini.

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E **[9]** The defendant further averred that this belief is based on what he had always heard from and been told by Ehdawiyah bte Hj Kunok herself, Aminah bte Hj Kunok, Weloh binti Lokonok, Md Salleh bin Saini as well as by the defendant's own mother Halipah bte Hj Kunok, in the course of the last 30 years, especially wherever family members and relatives congregated. The defendant contended that even the plaintiff is aware of this arrangement.

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[10] The wish of the late Hj Kunok bin Abdullah therefore, according to the defendant, made Ehdawiyah bte Hj Kunok and now her granddaughter, the plaintiff, being the registered owner of 1/8th of the said land, a constructive trustee of the disputed part for the benefit of Halipah bte Hj Kunok and her family. The assertion to this beneficial interest in the disputed part is thus the premise of the entry of the private caveat by the defendant on the said land. The defendant also in his affidavit enclosed affidavits affirmed by Mohd Huzairi bin Mohd Salleh (the defendant's cousin) and Weloh binti Lokonok (an aunt of the defendant, and sister to both Ehdawiyah bte Hj Kunok and Halipah bte Hj Kunok).

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[11] The plaintiff flatly denied the existence of any such understanding on ownership of the disputed part to be for the benefit of Halipah bte Hj Kunok other than the consent for the latter to cultivate the oil palm field thereon. The plaintiff therefore asserted that there was no necessity that the transfer of the registered ownership of the 1/8th of the said land must have first obtained the consent of the defendant and maintained that the transfer from

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Ehdawiyah bte Hj Kunok to the plaintiff was undertaken in accordance with the applicable regulations. The plaintiff also strongly disputed any allegation of fraud by any party as made by the defendant.

[12] The plaintiff supported her contention by the filing of the affidavits said to be deposed by Ehdawiyah bte Hj Kunok herself, as well as by Yusof bin Hj Lesa, the plaintiff's father (ie, Ehdawiyah's son in law) and Siti binti Masik, her mother (ie, Ehdawiyah's daughter). The plaintiff's parents are cousins. A review of the three affidavits revealed that the three affidavits are consistent in their explanation that consent was given to Halipah bte Hj Kunok to only work on and cultivate the disputed part but were equally categorical in stating that this did not amount to any intention or obligation to transfer the ownership of the same to Halipah bte Hj Kunok.

[13] Those are the background facts which in my view are relevant to provide the requisite context to this application by the plaintiff for the removal of the private caveat entered by the defendant.

Preliminary Objections On Affidavits

(a) Objection By Plaintiff

[14] Each of the plaintiff and the defendant raised preliminary objections on the supporting affidavits for the other. First, the plaintiff's objection. The plaintiff objected to two affidavits, each affirmed by Mohd Huzairi bin Md Salleh and Weloh binti Lokonok, both dated 18 February 2015 and were together exhibited by the affidavit in reply by the defendant dated 18 February 2015 in "exh. AG-4". The basis of the objection is that the affidavits in exh. AG-4 had not been filed in the court registry nor paid the requisite filing and stamp fees. Further, these are new affidavits affirmed and intended to support the defendant's case and had not been used in other proceedings.

[15] The plaintiff submitted that the affidavits in exh. AG-4 could not be used in this application as they did not comply with either O. 32 r. 13 or O. 41 r. 9 of the Rules of Court 2012 ("RC 2012"). Specifically, O. 32 r. 13(1) provides the following:

> 13 (1) Any party -
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> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
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> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,
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> shall serve the affidavit on every other party or give notice of his intention to do so in Form 58, as the case may be.

[16] It is the contention of the plaintiff that the affidavits in exh. AG-4, being new affidavits and which have not previously been used in any other proceedings, cannot therefore seek the benefit of the provision of O. 32 r. 13(1)(b).

[17] Of greater relevance, the plaintiff further submitted that there was a clear transgression of O. 41 r. 9(1) which states as follows:

> 9 (1) Except as otherwise provided by these Rules every affidavit shall be filed in the Registry.

[18] Although not highlighted by the plaintiff, it is useful that I should also make reference to O. 41 r. 9(2) which reads as follows:

> 9 (2) Every affidavit shall be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so endorsed may not be filed or used without the leave of the Court.

[19] In addition, O. 49 rr. 10(1) and (2) provides the following:

> 10 (1) Subject to paragraph (2), an original affidavit may be used in proceedings with the leave of the Court, notwithstanding that it has not been filed in accordance with rule 9.
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> (2) An original affidavit may not be used in any proceedings unless it has previously been stamped with the appropriate fee.

[20] The plaintiff relied on the case of *Calex-HLK Ltd lwn. Nordin Abdul Hamid & Satu Lagi* [1997] 5 CLJ 58; [1997] 5 MLJ 589 where the High Court ruled that if the requisite fee has not been paid and stamped on the affidavit, the same is invalid *ab initio*.

[21] In my view, not being affidavits filed in previous proceedings, the affidavits in exh. AG-4 do not fall within the ambit of O. 32 r. 13(1)(b). However, having examined exh. AG-4 and considering the applicable legal principles, I am of the view that the affidavits in exh. AG-4 may be used in the current proceedings for the following reasons:

(i) the said two affidavits have been properly exhibited to the affidavit in reply affirmed by the defendant in accordance with O. 41 r. 11 of RC 2012 which governs documents annexed to affidavit. The two affidavits are properly annexed to the affidavit in reply of the defendant and correctly identified by a certificate by the Commissioner for Oaths before whom the said affidavit by the defendant was sworn. Exhibits annexed to an affidavit form part of the affidavit (see *Lee Chin Ho & Anor v. Syed Hussien bin Salim Al-Attas & Anor* [2000] AMEJ 0106). The often-quoted English authority on this is *Re Hinchcliffe* (1895) 1 Ch 177 where AL Smith LJ said:

> When a person makes an affidavit and states therein that he refers to the document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense.

In the case of *Wong Hong Toy & Anor v. Public Prosecutor* [1986] 2 CLJ 491; [1986] CLJ (Rep) 851; [1988] 2 MLJ 553, it was held that a statutory declaration exhibited in an affidavit forms part of the affidavit and can

be used as evidence. In the case of *Rock Records (M) Sdn Bhd v. Audio One Entertainment Sdn Bhd* [2005] 1 CLJ 200; [2005] 3 MLJ 552 it was held that statutory declarations annexed to affidavits by virtue of the former O. 41 r. 11(1) need not be the originals;

(ii) thus, although the two affidavits in the instant case in exh. AG-4 were not stamped, the fact that they are annexed to a properly filed and stamped affidavit of the defendant should not result in the same being similarly treated like the situation in *Calex-HLK* where the affidavits being challenged were the ones being affirmed by the applicant herself and where there was no issue of unstamped affidavits being annexed to another affidavit. *Calex-HLK* itself cannot be said to be the authority for the proposition that in all cases, unstamped affidavits will be deemed not valid from the start. The facts and circumstances of each case must be properly examined and appreciated. In *Calex-HLK*, the affidavits in question were also rejected because the same did not comply with the mandatory requirement pertaining to the preparation of affidavits in the national language in accordance with O. 92 r. 1 of the then Rules of the High Court 1980;

(iii) even if the aforesaid two affidavits in exh. AG-4 cannot be deemed valid despite being in adherence to O. 44 r. 11, O. 41 r. 4 (more on this below) may justifiably be invoked and leave be granted to allow the use of the same notwithstanding the irregularity which I considered to be formal in nature, and which did not in any way impair the integrity of their contents, and certainly not occasion any undue hardship or substantial prejudice to the plaintiff in the instant case;

(iv) in any event, I would also not hesitate to take the view that O. 1A of RC 2012 which mandates a judge to have regard to the overriding interest of justice and not only to the technical non-compliance with the rules, to be applicable to the situation relevant to the two affidavits in exh. AG-4;

(v) I should make it clear that whilst O. 41 r. 11 may not be an issue, there is still a concern with regard to the strict compliance with O. 41 r. 10(2). It cannot be the intent of the law and the RC 2012 that non adherence to the requirement to stamp be allowed to be circumvented in this manner. In the case of *Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn Bhd (No 1)* [2001] 8 CLJ 300; [2002] 1 AMR 890 it was held that an unfiled and unstamped affidavit exhibited in another affidavit, just like in the situation in the instant case, not to be an original affidavit for the purposes of O. 41 r. 10 and therefore, could not be used. Nevertheless, in that case which involved an application for an *ex-parte* injunction, firstly, the grounds in support of the application as stated in the *ex-parte* summons in chambers contained an inaccuracy in that it stated that the application was relying on two affidavits which had been filed when in actual fact only one was properly filed whilst the other was merely

exhibited to the first affidavit. Secondly, the deponent of the first affidavit affirmed that he relied entirely on the second affidavit, making the latter the principal affidavit intended to be relied on in that application. Thirdly, like in *Calex-HLK* the said second affidavit did not comply with O. 92 r. 1 on the need for affidavits to be in the national language. The High Court in *Inter Heritage* was especially concerned with the effects of allowing an *ex-parte* injunction on the basis of that one affidavit which was tainted with a number of infirmities. Accordingly, in my view *Inter Heritage* and *Calex-HLK* can be distinguished from the instant case;

(vi) I further venture to add that if for argument sake, the reason for the exhibiting the two affidavits was due to the lawyer's mistake, I am reminded of the following passage from the judgment of that great judge, Lord Denning MR in *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 All ER 199, also referred to in *Inter Heritage*:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can at least, order a new trial.

[22] For the reasons as aforesaid and specifically on the grounds of either of O. 41 r. 4 or O. 1A being invoked, as well as that the instant case can be distinguished from the High Court's decisions in *Calex-HLK* and *Inter Heritage*, I held that the affidavits of Mohd Huzairi bin Md Salleh and Weloh binti Lokonok, as annexed as exh. AG-4 to the affidavit in reply affirmed by the defendant, may accordingly be used and relied on by the defendant in the instant proceedings.

(b) Objections By Defendant

[23] The defendant, on the other hand, raised an objection against reliance on the three affidavits in reply, each filed by Ehdawiyah bte Hj Kunok, Siti binti Masik and Yusof bin Hj Lesa, respectively. The basis of the objection is that having affixed their thumbprints instead of signing their respective affidavits, the three are considered illiterate. Yet all three affidavits did not contain the requisite jurat to be used in cases involving deponents who are illiterate, in violation of O. 41 r. 3 and r. 8 of RC 2012. Order 41 r. 3 states the following:

> Affidavit by illiterate or blind person (O. 41 r. 3)
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> 3 Where it appears to the person administering the oath that the deponent is illiterate or blind, he shall certify in the jurat that -
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> (a) the affidavit was read in his presence to the deponent;
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> (b) the deponent seemed perfectly to understand it; and

(c) the deponent made his signature or mark in his presence, A

and the affidavit shall not be used in evidence without such a certificate unless the Court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.

In this case, as highlighted by the defendant there is no jurat certificate as required by O. 41 r. 3 in the affidavits of the three. B

[24] Before I address the issue on the absence of the jurat certificate, I should quickly mention that the defendant also submitted that the affidavit said to be affirmed by Ehdawiyah bte Hj Kunok was also defective since it was not attested before a Commissioner for Oaths. This claim is wholly erroneous on the facts. All three affidavits were in fact stated to be affirmed C before a Commissioner for Oaths (Marliana bt Bakri No: J175). So, this point of objection has no merits.

[25] The word "illiterate" is not defined in the RC 2012. The High Court in the case of *S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152 ("*S Ravi G Suppiah*") referred to the *Shorter Oxford English Dictionary* where the said word is defined as one who is unable to read. In the context of an affidavit in Bahasa Malaysia, Low Hop Bing J (as he then was) in that case held that it must mean that the deponent is unable to read Bahasa Malaysia. D E

[26] In the case of *Fulcrum Capital Sdn Bhd v. Low Kon Yang* [2003] 8 CLJ 149 ("*Fulcrum Capital*") Abdul Aziz Mohamad J (as he then was) held that an illiterate person under O. 41 r. 3 must be in reference to a person who is as disadvantaged as a Braille-untrained blind person, who is ignorant of letters, adding that: F

In other words, letters mean nothing to him. He is as good as blind where letters are concerned.

He may not even be able to sign or write his name. That is probably why form (c) speaks of the person making his "mark" to the affidavit. The *Concise Oxford Dictionary* says that a "mark" is "a cross etc. made in place of a signature by an illiterate person". G

[27] It thus appears that although the ordinary meaning of the word "illiterate" in both cases is virtually the same, namely the inability to read or understand letters generally, the case of *S Ravi G Suppiah* is an authority for the proposition that a person can be illiterate in one language but not H necessarily in another. This has since been followed where the determination is on whether the deponent is literate *vis-à-vis* the language of the affidavit. Thus in *S Ravi G Suppiah* the deponent reads Tamil but is deemed illiterate in Bahasa Malaysia. A deponent who signed in Chinese (hence literate in the language) on an affidavit in Bahasa Malaysia was considered to be illiterate I in *Gan Thing Phing v. Ong Gek Kim (No 2)* [1999] 7 CLJ 146; [1998] 7 MLJ 351 ("*Gan Thing Phing*"). *Fulcrum Capital* on the other hand was quite clear in its ruling that an illiterate person is "buta huruf" and as good as blind in

so far as letters are concerned, which in my view must mean letters of any language. In any event, the apparent distinction is of little relevance to the instant case as the affidavits of the three deponents are in the same language of Bahasa Malaysia in respect of which the deponents are said to be illiterate, in the sense of not being able to read or write the language.

[28] A jurat is the certificate of the administering officer or the person before whom the affidavit is sworn (ie, typically the Commissioner for Oaths). It is referable to the words written at the foot of an affidavit, specifically when, where and before whom such affidavit is sworn (see *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh* [2001] 2 CLJ 235; [2001] 5 MLJ 317). Reverting to the issue of the absence of the certification of jurat in affidavits sworn by illiterate deponents, in the first place it was ruled in the case of *Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim (No 2)* [1999] 4 CLJ 21 that there is however no proposition in law that a person who thumbprints an affidavit is deemed to be an illiterate. It is for the party alleging illiteracy to prove that the deponent is not literate. Order 41 r. 3 is designed to safeguard the interest of illiterate deponents. It stipulates the need for the Commissioner for Oaths to satisfy himself that the three requirements are complied with when a deponent appears to him to be illiterate. However, I observe that the plaintiff in the instant case did not in her affidavits or submission deny that any of the said three deponents is illiterate.

[29] The Commissioner for Oaths must state in the jurat that first the affidavit was read in his presence to the deponent, secondly the deponent seemed to perfectly understand it and thirdly, the deponent made his signature or mark in his presence. In the instant case there is total non-compliance with O. 41 r. 3 in each of the three affidavits.

[30] It is trite law that the jurat to an affidavit must state that it was understood by the deponent and that it was read over and explained to him. An affidavit by an illiterate person which did not appear to have been read over and explained to him with a jurat which did not state that the deponent put his mark in the presence of a Commissioner for Oaths was thus rejected in *Pilkington v. Himsworth* [1835] 5 LJ Ex Eg 47. The appropriate form of jurat should be used to ensure that the deponent understands what is stated in his affidavit (see *Fulcrum Capital*). Under O. 41 r. 1(7), every affidavit shall be signed by the deponent and the jurat shall be completed and signed by the person before whom it is sworn. Order 41 r. 1(8) further stipulates that a jurat shall be in one of the forms in Form 74. The appropriate form of jurat for an illiterate or blind deponent is Form 74(c). The jurat for Form 74(c) reads as follows:

> To an affidavit by an illiterate or blind person ... Sworn (or affirmed) on the ... day of ... 20 ... at ...
>
> I, having truly, distinctly and audibly read over the contents of the above affidavit (add if exhibits are referred to in the affidavit "and explained the nature and effect of the exhibits therein referred to") to the said deponent

who seemed perfectly to understand the same and who made his mark thereto in my presence (Through the interpretation of ...). A

Before me)
)
...) B
Commissioner for Oaths)

[31] The certification by the Commissioner for Oaths on the three requirements is mandatory and must be "meticulously complied with" (see *S Ravi G Suppiah*). However, in the instant case, although the deponents are all Malays such that, no interpretation is additionally required given that the affidavits are all in Bahasa Malaysia, the form of jurat as per Form 74(c) is totally absent from the three affidavits. C

[32] Order 41 r. 3 requires a person administering the oath to certify if the deponent is illiterate or blind (see *Mohan Paramsivam v. Sepang Omnibus Company Sdn Bhd* [1988] 1 LNS 207; [1989] 1 MLJ 247; *S Ravi G Suppiah*). In the latter case the affidavit of the deponent was affirmed in Bahasa Malaysia and signed in Tamil. The court ruled the affidavit to be defective as there was nothing in the affidavit to indicate that the contents of the affidavit appeared to have been perfectly understood by the deponent. In *Gan Thing Phing*, as the deponent signed in Chinese on the affidavit written in Bahasa Malaysia, in the absence of a statement in the jurat that the contents had been translated to the deponent, the affidavit was disregarded. D E

[33] I agree with the plaintiff's counsel that if the Commissioner for Oaths omits to certify the jurat as required by O. 41 r. 3, the affidavit can still be used if the court is otherwise satisfied that the affidavit had been read to and appeared to be perfectly understood by the deponent. It is manifest that O. 41 r. 3 itself contains a saving clause to that effect. In the case of *UMAS Sendirian Bhd v. RHB Bank Bhd & Anor* [2000] 6 CLJ 564 the three requirements of O. 41 r. 3 were not strictly complied with but the High Court accepted the affidavit where the jurat merely stated to be read over and explained to the deponent in Bahasa Melayu by the Commissioner for Oaths. However, the facts in that case can be easily distinguished from those in the instant case since the jurat in the latter does not even contain those words, nor is there evidence that can support a finding that the affidavit was read to each of the said three deponents or that they appeared to perfectly understand the same. F G H

[34] Separately and in addition, it should also be reiterated, as highlighted earlier in this judgment when considering the preliminary objection of the plaintiff, that pursuant to O. 41 r. 4 an affidavit may with the leave of the court be used in evidence notwithstanding any irregularity in the form thereof. In *Fung Yuk Lien v. Foong Chee Sam* [2000] 6 CLJ 411 the name of the person who interpreted the affidavit to the deponent before the latter I

places her thumbprint was not stated. The High Court ruled that this is a mandatory requirement given the word "must" in O. 41 rr. 1(7) and 1(8) of the Rules of the High Court 1980 (which provisions are in *pari materia* with the present O. 41 of the RC 2012). This was held to be a serious defect and not merely an irregularity which could be saved by O. 41 r. 4. It is to be noted that in that case, the form of jurat did not include reference to the name of the interpreter, and this was deemed to be fatal. By comparison, in the instant case, there is total non-adherence to O. 41 r. 3. In the case of *Chan Kiew v. Lai Sang & Anor* [2002] 5 CLJ 69, where the deponent was illiterate in Bahasa Malaysia, the wrong form of jurat was used resulting in non-compliance with the requirements of O. 41 r. 3 as per Form 74(c) (previously Form 78(c) under the former Rules of the High Court 1980). There was thus no evidence to indicate that the deponent seemed perfectly to understand the contents of the affidavit. The High Court held that the defect was serious and incurable under O. 41 r. 4 as well as under O. 2 r. 1. Similarly in the instant case there is nothing to suggest the deponents appreciate the contents of the affidavits, in light of the total absence of the jurat in Form 74(c). Order 41 r. 4 thus confers on the court the discretion to admit affidavits which are defective due to "irregularity of the form" and this is often distinguished by case law from "defect in substance". In the case of *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh,* the High Court considered the seriousness of the irregularity to be a more important factor than that there is no resultant real prejudice. In this case, the affidavit was rejected as the jurat was not titled in the action and failed to state that interpretation was not required. The defect was deemed to be serious and no formal application was in any event made for leave under O. 41 r. 4. In *Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors (No 2)* [2003] 3 CLJ 39; [2003] 6 MLJ 103 the High Court held that the onus is on the plaintiff to ensure the authenticity of the affidavits before any dispute arises. Although it is open to the plaintiff to apply for leave of the court under O. 41 r. 4, a cogent case for leave must be made out depending on the nature and number of and the reasons for such non-compliance. It was further held that O. 41 r. 4 may not be invoked to cure a defect which goes to the root of the affidavit as the rule does not empower the court with any such discretion. In the case of *Ian James Rogers v. Menteri Sumber Manusia & Satu Lagi* [1997] 1 LNS 433; [1998] 5 MLJ 290, an affidavit affirmed by an Englishman in Bahasa Malaysia before a Notary Public in the United Kingdom was ruled to be defective and not valid in the absence of proof that either of them understood Bahasa Malaysia. There was also an absence of jurat in the affidavit in this case. As the affidavit was defective in its validity from the beginning, the High Court ruled that the same could not be saved by O. 41 r. 4.

[35] I should now highlight briefly two cases which have surfaced from my review of the law in this area where defects concerning the jurat were however cured by the court. The first is *Wong Choon For v. Lim Chee Hooi*

& Ors [2002] 5 CLJ 556 ("*Wong Choon For*"). The following passage from the judgment of Ramly Ali JC (as His Lordship then was) referring to the equivalent provisions in the Subordinate Courts Rules 1980 is of relevance:

> The only 'non-compliance' in the said jurat is that the last part which states "(Through the interpretation of ...)" was not properly filled in. Instead of writing his full name after the words "(Through the interpretation of ...)" the interpreter (who was also the same person as the commissioner for oaths) has put his rubber stamp bearing his full name and the words "(Jurubahasa Mahkamah Bersara (Tingkatan Tinggi)". Even though this does not fully comply with the format as in Form 71(c), it is not to be considered as fatal because there is still some indication to show that the contents of the affidavit have been interpreted to the deponent. In any event, what is more important in affirmation of affidavits, be it by way of Form 71(a), (b), (c) or (d), is that the person who administers the oaths ie, the commissioner for oaths, must be fully satisfied and certified that the deponent seemed perfectly to understand the affidavit, either through his own understanding or through the interpretation of an interpreter; and that the deponent made his signature or mark voluntarily in his presence. In the present case, the commissioner for oaths has made such certification in the jurat.
>
> On the above justification, I am of the view that the so-called "non-compliance" with the SCR 1980 as raised by the respondents in their preliminary objection is not serious, and at most, can only be considered as a mere irregularity which can be cured and the said affidavit can be used in evidence under Order 25 r. 25 of the SCR 1980 to support the appellant's application. Order 2 r. 1 of the SCR 1980 also provides that such non-compliance shall only be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein. In the premise, I have no hesitation to overrule the respondents' preliminary objection and to accept the said affidavit to be used for the purpose of the appellant's application.

[36] In the case of *Mohan Paramsivan v. Sepang Omnibus Company Sdn Bhd* [1988] 1 LNS 207; [1989] 1 MLJ 247 ("*Mohan Paramsivan*") an affidavit which did not even contain a jurat despite the deponent not being literate in English was saved by the court granting leave under O. 41 r. 4 for the use of such defective affidavit in court. However, I observe that in that case there was no analysis or discussion as to the applicable authorities concerning defective jurat and on situations O. 41 r. 4 could be invoked. In any event the High Court in that case did specifically state that it was mindful that whatever was affirmed by the deponent (who had allegedly sold the shares to the applicant) may not be the truth of the whole matter. The affidavit in that case in my assessment did not appear to feature much in the main issue of consideration which pertained more to whether the refusal by the directors to transfer the shares of the applicant was made in good faith. The High Court found that the refusal was due to the sole purpose of endorsing the

government's policy to encourage active Bumiputera participation in private business such as the respondent company, with the result that 29.8% Bumiputera stake could continue to be retained.

[37] Accordingly, in my view neither *Wong Choon For* nor *Mohan Paramsivan*, both of which involved the reliance on O. 41 r. 4 to cure defective affidavits, is of much assistance to the plaintiff's case. Not only are the facts very different, the defect in the form of the omission in the instant case is manifestly much more serious and fundamental. Finally, the only case cited by parties before me on the issue of defective jurat in their respective submissions, that is *Fulcrum Capital* is also not an authority that can save the three affidavits intended to support the plaintiff's application. In *Fulcrum Capital*, the High Court held that the important thing is to ensure that the deponent understands what he is saying in his affidavit. But nowhere in the judgment does the court sanction any form of non-compliance with the requirement on jurat for illiterate deponents or that O. 41 r. 4 could be resorted to for any such lapses. If anything, in the instant case, *Fulcrum Capital* supports the defendant's position, since there is nothing to show that the deponents, despite being illiterate, understand what they are purportedly stating in their respective affidavits.

[38] Therefore on a proper evaluation of the law applicable to the three affidavits, it is my view that the non compliances with O. 41 r. 3 in respect of the failure to state the certification jurat by the Commissioner for Oaths would constitute a substantive irregularity which does not only affect the form of the requirements of O. 41 r. 3, but could also be deemed to be a breach of a fundamental nature that cannot be cured or remedied by O. 41 r. 4 nor O. 1A (court shall have regard to justice and not just to technical non-compliance) nor O. 2 r. 3 (preliminary objection for non-compliance with rules not allowed) of the RC 2012. The terms of O. 41 r. 3 are mandatory and preclude the application of O. 2 r. 3. The defect is serious and goes to the root of the affidavit. It is fundamental and has occasioned a substantial miscarriage of justice and a prejudice that cannot be cured by either by amendment or an order for costs because it cannot be said that the deponents actually understand what have been written in their own affidavits. Even if there is no prejudice, a defect in an affidavit could be so serious to make it incurable under O. 2 r. 1 (*Utama Merchant v. Dato' Mohd Nadzmi Mohd Salleh*). Nor is there any other evidence that can persuade the court to admit the affidavits such as a confirmation by lawyers by affidavit that the three had been given explanation about the affidavits and the thumbprints are certified to be theirs. I emphasise that the omission in respect of the certification in the jurat is substantive and sufficiently material because rules concerning certification jurat cannot be considered as mere technicalities or formalities. They are integral to the very question on the authenticity of the contents of the affidavits which are to be used as evidence in the court of law. Accordingly, as the three affidavits are defective, the plaintiff cannot place any reliance on the same.

Law On Removal Of Caveats

[39] I shall next consider, bearing in mind the rejection of the three affidavits following my decision to allow the preliminary objection by the defendant, whether the plaintiff's application for the removal of the private caveat by the defendant is tenable. Section 327 of the NLC states as follows:

> 327 Removal of private caveats by the Court
>
> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.
>
> (2) The Registrar shall, on being duly served with any order under this section for removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.
>
> (3) Every cancellation under sub-section (2) shall be signed and sealed.

[40] As the registered proprietor, the plaintiff is clearly a person aggrieved by the existence of the private caveat in the said land (see *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212 ("*Eng Mee Yong*")). It thus falls upon the defendant as the caveator to satisfy the court that the caveat should remain. The law governing this is quite settled in that only upon the caveator satisfying a three-stage test can a caveat be permitted to remain, as clarified by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719 ("*Luggage Distributors*"). Gopal Sri Ram JCA (as he then was) stated the following:

> ... a private caveat may be entered at the instance of any person or body who claims either: 1) the title to land; or 2) any registrable interest in land ... it is only one who makes a claim to either of these in land may enter a private caveat.
>
> In considering an application for the removal of a caveat, the procedure to be adopted should be a simple and summary one. At the first stage, the court will examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. Once the court is satisfied that the caveator's claim amounts in law to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies.

As such, the defendant must satisfy the court on a balance of probabilities that firstly he has a caveatable interest, secondly that there are serious issues to be tried and that thirdly the balance of convenience would favour the caveat remaining on the register.

Analysis And Findings

[41] The first threshold issue is whether the defendant has a caveatable interest. Section 323(1) of the NLC states as follows:

> 323 Applications for entry of private caveats
>
> (1) The persons and bodies at whose instance a private caveat may be entered are -
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

[42] Based on the statutory Form 19B and the statutory declaration affirmed by the defendant on 3 November 2014 which had been used to support the entry of the private caveat, the defendant is, as stated earlier, essentially claiming that the disputed part had been worked on by him and his family for the last 30 years. The disputed part is situated within the 1/8th of the said land previously owned by Ehdawiyah Hj Kunok. However, the entirety of the 1/8th of the said land was transferred to the plaintiff without any reference to or consent of the defendant (on behalf of Halipah bte Hj Kunok).

[43] In substance, the defendant is claiming that he has a beneficial interest in the disputed part which can be caveated. It is clear that based on s. 323(1) of the NLC, it is only the one who asserts a claim to either title or a registrable interest in land or who asserts a right thereto who may enter a private caveat. I have no hesitation in holding that his claim to the disputed part in the manner described above is a caveatable interest which entitles the defendant to exercise his right to enter a private caveat for the protection of the claim.

[44] Case law authorities have shown that beneficiaries of an estate have caveatable interest on the land (*Long Pines Enterprise Sdn Bhd v. Beeran Kutty Yusof* [1999] 1 CLJ 278; [1997] 4 MLRH 731). Further, a claim to a registrable interest in land in respect of a house which the claimant had built and in which he had been living without rental payments and uninhibited for a substantial period of time was similarly considered to be a "caveatable interest" (see *Jivanjit Kaur Sohan Singh v. Amar Singh Sunder Singh* [2000] 1 LNS 64; [2000] 4 MLJ 55).

[45] Accordingly, I am satisfied that the defendant had shown that he has a caveatable interest over the said land, justifying the entry of the private caveat.

[46] The second question to be asked in the three-stage test is whether the claim discloses a serious question meriting a trial. It is manifestly clear, to my mind, that the facts of this application, as described earlier in the

judgment show a principal issue of dispute concerning the ownership of the disputed part. The diagrammatically opposed versions offered by the defendant and the plaintiff raised the key bone of contention as to whether Hj Kunok bin Abdullah had actually requested that a part of the said 1/8th of the said land held by Ehdawiyah bte Hj Kunok should rightfully be for the benefit of and thus transferred to the defendant's mother.

[47] An important point to note is that a fairly substantial support in the form of affidavit evidence sought to be relied upon by the plaintiff is now incapable of being used given my decision to reject the three affidavits by Ehdawiyah bte Hj Kunok, Yusof bin Lesa and Siti bte Masik. Thus the case of the plaintiff is considerably weakened since a number of positive assertions and averments by the defendant on the principal issues of the requests and understanding concerning the disputed part cannot be truly contradicted by the plaintiff. This conclusion would not in my assessment be different even if the two affidavits in exh. AG-4 supporting the defendant were also to be rejected. This is because much depends on the affidavit of Ehdawiyah bte Hj Kunok to whom the request was purportedly directly made by Hj Kunok bin Abdullah, as asserted by the defendant. The plaintiff's attempt to contradict this contention is premised predominantly on the strength of the affidavit of Ehdawiyah bte Hj Kunok herself which, if accepted by the court (but which is not) would have been able to provide a strong rebuttal to and denial of the defendant's version of the facts. The averments in the other two rejected affidavits of Yusof Hj Lesa dan Siti bte Masik respectively also rely mainly on what were stated to be their understanding, in turn as told to them by Ehdawiyah bte Hj Kunok.

[48] Accordingly, I am satisfied that there are serious issues to be tried arising from the caveat and they should therefore be more properly tested and adjudicated during trial by way of *viva voce* evidence. Nevertheless, at present, given the rejection of the three affidavits, particularly that of Ehdawiyah bte Hj Kunok, the version offered by the defendant prevails, in light of the application of the principle in the case of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 as a number of assertions by the defendant would be deemed admitted in the absence of a clear denial which would have otherwise been given by direct evidence in form of the affidavit of Ehdawiyah bte Hj Kunok. I reiterate that the affidavits of the plaintiff rely considerably on the averments contained in the three affidavits which cannot now be used in this application.

[49] The third question to be addressed in the three-stage test is whether the balance of convenience favours either the retention or removal of the caveat. In the judgment of the Privy Council in *Eng Mee Yong*, Lord Diplock said the following:

> ... So too in an application by the caveator under section 327 for removal of a caveat once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious

A question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

B **[50]** In the instant case, the defendant has however not filed any suit to assert his claim now represented by the entry of the private caveat. This is contrary to the principle laid down in the case of *Eng Mee Yong* and latterly, *Onn Yee Kien & Anor v. On Giin Chuang* [2013] 5 CLJ 837; [2014] 1 MLJ 550 that a caveator, once he has lodged a private caveat against a particular C piece of land must take prompt action to enforce his claim in respect of the land in question. However, I note the submission of the defendant that no action has yet to be instituted as focus is on trying to discuss and settle the matter amicably. After all this application for the removal of caveat is between supposedly close relatives, all direct descendants of Hj Kunok bin Abdullah. The central figure in this application, Ehdawiyah bte Hj Kunok D is very elderly and illiterate which made the defendant very reluctant to call her, his own aunt, as a witness to be examined either in this application by way of an examination on oath under O. 39 of RC 2012 or at any trial proper.

[51] There are case law authorities that have allowed caveats to remain on E the register even though the main legal action has not been filed. In *Jit Kaur v. Parl Singh* [1974] 1 LNS 57; [1974] 2 MLJ 199 ("*Jit Kaur*"), the High Court dismissed the application to remove a caveat but ordered the respondent caveator to file the main action within six months from the date of the order. It was held that s. 327(1) of the NLC empowers the court to make such order as it may think just. Hashim Yeop A Sani J (as he then was) quoted a passage F in *The Torrens System in Malaya* at pp. 347 to 348 which reads as follows:

> In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the Court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The Court is loth to G prevent parties litigating any right that they think they may possess: *Re Caveat of Lewis* [1903] 23 NZLR 581. Where there is a conflict of testimony the caveat will not be discharged.

[52] In a more recent decision involving an application for removal of caveat in *Cendana Konsep Sdn Bhd v. Island Concept Sdn Bhd* [2013] 1 LNS H 858; [2014] 9 MLJ 331 the High Court referred to *Jit Kaur* as precedent that would have justified an order in that former case for the suit to be filed had it not been done, in its decision to allow the caveat to remain. Accordingly, in my judgment, the balance of convenience would favour leaving the caveat in existence but that pursuant of s. 327(1) of the NLC, I order that the defendant I must file the main action within three months from the date of my decision.

[53] In the absence of the three affidavits, particularly that of Ehdawiyah bte Hj Kunok whose averments would have been material if not crucial to the application (being the registered proprietor prior to the transfer to the

plaintiff) and who was said to have been reminded by Hj Kunok bin Abdullah to hold the disputed part on behalf of Halipah bte Hj Kunok, based on the totality of the available admissible affidavit evidence, the defendant has succeeded in fulfilling the three stage test expounded in *Luggage Distributors* to resist the removal of the caveat. The plaintiff herself, in her affidavit relies substantially on the three rejected affidavits, especially that of Ehdawiyah bte Hj Kunok since the plaintiff has no direct knowledge of the background of the matter which only Ehdawiyah bte Hj Kunok should naturally be more familiar with. I have no hesitation to add that I would have still arrived at the same finding even if the two affidavits in exh. AG-4 supporting the defendant affirmed by Mohd Huzairi bin Md Salleh and Weloh binti Lokonok respectively were not relied on.

[54] Further, I do not find it necessary to consider the allegation of fraud in the transfer of the said land from Ehdawiyah bte Hj Kunok in favour of the plaintiff, as argued in the defendant's submission in reply, that could defeat the indefeasibility of the plaintiff's title to the said land. In any event based on affidavit evidence, I do not find any well grounded basis for this allegation which centred on the possibility that if Ehdawiyah bte Hj Kunok is illiterate she might not have appreciated the fact and implication of the transfer of ownership of the said land to the plaintiff. Furthermore, suspicion is not proof of fraud (see *M Ratnavale v. S Lourdenadin* [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168 SC; [1988] 2 MLJ 371). Fraud is a serious allegation and should rightfully only be made in the clearest of cases. Thus, unless the defendant could prove that the plaintiff, as the registered owner, was a party or privy to fraud or misrepresentation, the plaintiff has a good title against the whole world pursuant to s. 340(1) of the NLC. In the instant case, the defendant is very far from establishing either fraud or misrepresentation by the plaintiff.

Conclusion

[55] In conclusion, in view of the foregoing reasons in connection with the preliminary objection on the absence of certification jurat under O. 41 r. 3 in the three affidavits as raised by the defendant, my decision is to dismiss the application of the plaintiff under s. 327 of the NLC to remove the caveat (encl. 1). This decision is on account of the defendant succeeding on a balance of probabilities in proving his case for the retention of the caveat, in turn in no small measure attributed to the said defective affidavits which are accordingly rejected. I also awarded costs of RM800 to the defendant, who is however required to file the main action within three months from the date of my decision of 16 June 2015.